UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

IN RE SHEILA J. WIDNER, 7-01-00179-WSA

Debtor.

SHEILA J. WIDNER,	)	
	)	Case No. 1:02CV00207
Appellant,	)	
	)	
v.	)	**OPINION**
	)	
FIRST NORTH AMERICAN NATIONAL BANK,	)	By: James P. Jones
	)	United States District Judge
	)	
Appellee.	)	

Jo S. Widener, Bristol, Virginia, for Appellant; Jeffrey A. Fleischhauer, Jeffrey A. Fleischhauer, P.C., Roanoke, Virginia, for Appellee.

This bankruptcy appeal presents the knotty problem of the nondischargeability of credit card debt. Based on the record, I find that the bankruptcy court was not clearly erroneous in its factual finding and thus affirm its holding that the debt was partially nondischargeble.

I

The appellant, Sheila J. Widner, is a Chapter 7 debtor. Her petition was filed in the bankruptcy court on September 4, 2001. Thereafter, the appellee, First North American National Bank, one of her creditors, filed an adversary proceeding seeking a declaration that credit card charges by Widner between June 8 and June 21, 2001, totaling $1,683.23, were nondischargeable under § 523(a)(2)(A) of the Bankruptcy Code.[1] After an evidentiary hearing, the bankruptcy court (Stone, J.) found that a lesser amount, $661.25, representing charges between June 18 and 21, 2001, were nondischargeable because they were obtained by fraudulent means.[2] This appeal by Widner followed.[3]

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[1] 11 U.S.C.A. § 523(a)(2)(A) (West 1993 & Supp. 2002).

[2] *First N. Am. Nat'l Bank v. Widner (In re Widner)*, 285 B.R. 913, 921 (Bankr. W.D. Va. 2002).

[3] This court has jurisdiction pursuant to 28 U.S.C.A. § 158(a)(1) (West 1993 & Supp. 2002). The appellant has briefed the issues in the case. The appellee requested and was granted leave not to file a brief, in light of the amount involved in the case. I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

II

Bankruptcy Code § 523 provides certain exceptions to the discharge of an individual debtor. One such exception is for extensions of credit "to the extent obtained by . . . false pretenses, a false representation, or actual fraud."[4] The Supreme Court has held that these terms "incorporate the general common law of torts."[5] Nevertheless, it has proved difficult to apply the statute to the typical consumer credit card situation. As one observer has put it, "[o]ne can only conclude that the courts have made a muddle of the task."[6] In the absence of Fourth Circuit authority the bankruptcy court adopted a careful middle approach, requiring the creditor to prove that at the time the debtor made the credit card charges at issue, she had an intent not to pay them, based on her knowledge that in her current financial situation, they could not be repaid.[7]

The debtor denied that she had an intent not to pay the credit card charges. After a thorough review of the evidence, however, the bankruptcy court concluded that based on all of the circumstances, Widner knew on and after June 18, 2001, that

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[4] 11 U.S.C.A. § 523(a)(2)(A).

[5] *Field v. Mans*, 516 U.S. 59, 70 n.9 (1995).

[6] Margaret Howard, *Shifting Risk and Fixing Blame: The Vexing Problem of Credit Card Obligations in Bankruptcy*, 75 Am. Bankr. L. J. 63, 86 (2001).

[7] *See* 285 B.R. at 917-18.

she would be unable to make any further payments but nevertheless continued to charge on her card until June 21, for a total of $661.25.

When reviewing decisions of the bankruptcy court, its factual findings are subject to reversal only if clearly erroneous, while issues of law are considered de novo.[8] The subjective fraudulent intent of the debtor is essentially a factual issue.[9] A factual finding is clearly erroneous if there is no evidence to support it or "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[10]

The bankruptcy court applied the correct legal rules in its analysis of the creditor's claim of nondischargeability. Moreover, I cannot say that its factual finding that the debtor had no intent to pay is clearly erroneous, even though the record would support a contrary finding.[11] Accordingly, I must affirm the decision.

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[8] *See* Fed. R. Bankr. P. 8013.

[9] *See Miller v. Premier Corp.*, 608 F.2d 973, 982 (4th Cir. 1979).

[10] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

[11] *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

III

For the reasons stated, the final order of the bankruptcy court in this adversary proceeding will be affirmed. A separate judgment will be entered herewith.

DATED: February 14, 2003

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United States District Judge